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Appellee's Brief 1975-SC-1082

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**KYSC1975-SC-1082-02**

{9C497893-B978-4613-BCCA-19245D62B787}

{134945}{54-130314:154010}{032976}

# **APPELLEE'S BRIEF**

SUPREME COURT OF KENTUCKY

FILE NO. 75-1082

FERGUSON (BOB)

APPELLANT

VS. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE W. B. HAZELRIGG, CIRCUIT JUDGE  
(TRIED BEFORE HON. W. D. SPARKS, CIRCUIT JUDGE)

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

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ATTORNEY GENERAL

FILED

MAR 29 1976

MARTHA LAINE COLLINS  
CLERK  
SUPREME COURT

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FRANKFORT, KENTUCKY 40601

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24th JUDICIAL DISTRICT

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I hereby certify that a copy of this Brief has been mailed, postage prepaid, to the Hon. W. B. Hazelrigg, Circuit Judge, Johnson Circuit Court, Johnson County Courthouse, Paintsville, Kentucky 41204; Hon. Eugene C. Rice, Commonwealth's Attorney, 24th Judicial District, Paintsville, Kentucky 41204; and to Hon. Jack L. Lewis, Attorney at Law, Court Street, Paintsville, Kentucky 41240, counsel for appellant, this 29th day of March, 1976.

  
Assistant Attorney General

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STATEMENTS OF THE QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT PROPERLY OVERRULED THE MOTIONS FOR A DIRECTED VERDICT AT THE CONCLUSION OF BOTH THE COMMONWEALTH'S AND DEFENSE'S PRESENTATION OF THE EVIDENCE BECAUSE THERE WAS SUFFICIENT CORROBORATING EVIDENCE TO SUBMIT THE ISSUE OF GUILT TO THE JURY?

II

WHETHER THE PROSECUTOR, IN HIS OPENING STATEMENT, HAD THE RIGHT TO DIRECT THE ATTENTION OF THE JURY TO ALL THE FACTS AND CIRCUMSTANCES THAT HE, IN GOOD FAITH, BELIEVED HE COULD DEVELOP DURING THE COMMONWEALTH'S PRESENTATION OF THE EVIDENCE?

III

WHETHER THE CLOSING ARGUMENT OF THE COMMONWEALTH'S ATTORNEY WAS OF SUCH INFLAMMATORY, IMPERMISSIBLE MAGNITUDE THAT REQUIRED EITHER THE TRIAL COURT TO DECLARE A MISTRIAL OR REQUIRES APPELLATE REVERSAL?

COUNTERSTATEMENT OF THE CASE

Appellant, Robert Ferguson, proprietor of B. and C.

Supermarket in Blaine, Lawrence County, Kentucky, stated he would deliver groceries to the Parker family, residing near Martha, Johnson County, Kentucky, practically every month, particularly when the weather was inclement (Transcript of Evidence, hereinafter TE, 128).

Drew Parker stated at TE 42 that his family had always traded with Mr. Ferguson and that he considered him to be a very good friend and that the appellant was always good to his children.

However, on November 20, 1974, Bob Ferguson, in the company of three comrades, visited the Parker household at about 8:30 or 9:00 p.m. (TE26). At TE 33-34, Mr. Parker stated:

...[Mr. Ferguson] come in the house and asked me did I care for him setting there till he sobered up, he wasn't able to drive. I said, no, Bob, I don't care if you set here a week as long as you act right. He was always a friend.

The aftermath of this neighborly gathering resulted in the Johnson County Grand Jury returning a three count indictment against Mr. Ferguson (Transcript of Record, hereinafter TR,11).

Appellant was convicted of KRS 435.130, unlawfully taking a seven year old child with intent to deprive its parents of custody, and sentenced to three years; and of KRS 435.105, carnally abusing the body and indulging in indecent and immoral practices with a seven year old child, and sentenced to 10 years (TR 56-57). These maximum sentences were imposed consecutively in the final judgment (TR 58-60). The Motion for a New Trial is at TR 61-62 and Notice of Appeal at TR 65.

A Supplemental Transcript was filed with the Court on December 10, 1975, consisting of thirteen pages of the testimony of Norma Jean Parker, the victim, who was interviewed on the day after the alleged incidents, November 21, 1974. The Clerk of the Johnson Circuit Court has certified the content as true and correct copies of the original record.

Appellant submitted a motion, filed on December 16, 1975, to strike the Supplemental Certification setting forth, what appellee concludes, are meritorious grounds for sustaining the motion.

The degrading, sordid content of the Supplemental Transcript

is not properly before this Court because of several deficiencies. The status of the interrogator is not indicated in the pre-trial statement, nor is there any indication that the child was placed under oath, or whether its content was submitted to the Circuit Judge for his ruling upon its admissibility. Further the Record on Appeal nowhere reflects that this out-of-court statement was ever introduced to the trial court. Therefore, appellee must concede that its content cannot be relied upon for support of appellee's position in convincing this Court to affirm the conviction of Mr. Ferguson.

Much examination is devoted throughout the TE in trying to determine what type of undergarments were being worn by the victim before and after the incident. Appellant discusses this inconsistent testimony in his brief. Appellee cannot unravel the confusing, contradictory statements made about whether Norma Jean Parker was wearing panties or shorts, and whether any of these items were actually found on the front porch of her home when she disappeared.

Additional testimony and evidentiary matter will be set out below in appellee's argumentations.

#### ARGUMENT

##### I

THE TRIAL COURT PROPERLY OVERRULED THE MOTIONS FOR A DIRECTED VERDICT AS THERE WAS SUFFICIENT CORROBORATING EVIDENCE TO SUBMIT TO THE JURY FOR ITS DETERMINATION AS TO WHETHER THE OFFENSES OF INDULGING IN INDECENT OR IMMORAL PRACTICES WITH A CHILD UNDER AGE OF 15 (KRS 435.105) AND UNLAWFULLY TAKING A CHILD UNDER 10 WITH INTENT TO DEPRIVE ITS PARENTS OF CUSTODY (KRS 435.130) HAD BEEN COMMITTED.

Norma Jean Parker, the seven year old daughter of Drew and Betty Jo Parker, prolific residents of Martha, Johnson County, Kentucky, testified at TE 109-118. She stated she remembered that

the appellant, Mr. Ferguson and his comrade, Mr. Justice, had come to her parents home. At TE 112:

Q16. I will ask you if, on the night that Dave Justice and Bob Ferguson were there, do you remember whether or not Bob Ferguson was sitting on the porch?

A. He was.

Q17. Do you know whether or not he carried you to the truck?

A. No answer indicated.

Q18. Do you remember if he carried you to the truck?

A. No.

Q19. Well, Norma, did you ever get in the truck when Dave Justice was there and Bob Ferguson drove up on the hill?

A. Yeah.

Q20. And you were in the truck up on the hill?

A. Yes.

On cross examination at TE 116:

Q26: Do you remember going up on the hill in the truck with Bob and Dave Justice?

A. Yes.

Q27. What did you all do up on the hill? Did you ask them to take you a ride in the truck?

A. Shakes head no.

The rest of the responses elicited from the child to various questioning is either negative or so vague in most details as to require the review of corroborating evidence to decide whether the directed verdict was properly denied.

Dr. E. E. Musgrave, a Paintsville physician, was directed to examine Norma Jean Parker on November 21, 1974. TE 15:

Q19. Doctor, when you were requested to



examine this young girl, seven year old Norma Jean Parker, on November 21st, would you tell the jury what your findings revealed?

A. Well, the physical findings revealed a very nervous small girl, who appeared to be in good physical condition, with the exception of three findings. She had a bruise on the rectum, she had irritation around the entrance to her vagina and she had linear horizontal scratches on the upper thighs.

The doctor further elaborated that the bruise on the rectum was of recent nature because of its color (TE 16); it would be speculation as to what caused the recent linear, cross-wise scratches in the thigh region (TE 17); that if someone were attempting to separate her legs, abrasive scratches would occur horizontally, whereas scratches occurring in weeds or sticks, while lying on the ground, would be random (TE 18). On cross examination the physician stated that the unusual amount of irritation could have been caused by a number of assorted factors (TE 19); that any blow or any force exerted unduly on the skin in the area of the rectum-vagina could have caused the bruise (TE 20); the scratches could have been made by fingernails (TE 21); that it was very important that the scratches, "instead of being oblique or crooked, they were exactly straight across from each other, so both thighs separated the same -- whatever caused the scratch; presumably at the same time." (TE 21); in his opinion nothing had entered the vagina (TE 22).

On Re-Direct at TE 24:

Q1. Doctor, so far as being molested, by the irritation of the vagina, the bruise or bruises of the rectum and the scratches indicated to you that something had happened to her in the way of being molested?

A. Well, it was a thing that you would see had a child been molested, yes. (emphasis added)

Mr. Ferguson testified that late on the evening in question he was drinking "drink for drink" with David Justice, Homer Fyfee, and Drew Parker. He got sick and he was sitting on the porch of

the two-room Parker house (TE 126). "Dry-heaves" set in, and when he went to his red and white chevy pickup truck to go home, Norma Jean was sitting in the truck and Dave Justice was in a stupor in the front seat with his head against the door. At TE 127:

Q29. And did the little girl, Norma, say anything to you?

A. Yes. I told her to get out and go in the house, I was going home, and she said she wanted to take a ride in the truck.

Q30. And then what did you do?

A. I told her I was sick and that I was going home and she said she wanted to take a ride, so I just through [sic] I would run her up to the top of the hill and back, and I got stuck while I was up there.

Q31. How long were you gone altogether?

A. Well, I would say I wasn't gone over twenty-five or thirty minutes. Something like that.

Q32. How did you get stuck?

A. Well, I had pulled up there to turn around and got in a ditch.

Q33. You weren't seeing too well along about that time?

A. Well not too good.

Mr. Ferguson was asked at TE 132 whether he touched the child in any sexual manner while she was in his pickup truck and he indicated that the only time he even touched her was when he shoved her toward David Justice, to avoid the shotgun blast that was about to be discharged by Mr. Parker, who had aimed at the windshield of the truck.

Mr. Parker, who had pursued appellant after notifying the authorities, responded at TE 33:

Q76. Mr. Parker, I believe you said that you

put your car across the road to try to stop the truck?

A. Yes.

Q77. Was that for the purpose of trying to get your little girl away from them?

A. Sure was.

Q78. When you shot Bob Ferguson's truck, for what purpose did you shoot?

A. I thought maybe he would stop and I could get her. I could have killed him but I didn't want to. I shot down below on the truck.

The Commonwealth's Attorney concluded his questioning of Mr. Ferguson at TE 140 which reveals the following poignant dialogue:

Q50. So what you told the jury here is the best explanation as to why you took this little girl on the hill that night around 10:30 or 11:00?

A. Well, I don't know what time it was. It was in the neighborhood of --

Q51. I mean, is that your best explanation -- what you have given the jury?

A. Well, it was up in the night some time. I didn't know exactly what time it was. I know that I was wanting to go home and that's where I had started.

Q52. Wanting to go home and sick and drunk but you still wanted to be a good fellow and take that little girl for a ride out there in November barefooted, and you thought you ought to take her for a ride in the truck?

A. Well, she was in the truck when I walked up there.

Q53. How old are you now?

A. I am thirty-nine years old.

By Mr. Rice: That's all.

Appellee submits that the carnal abuse of a child is a crime without regard to the reasons or the intent with which it was done. Hatfield v. Commonwealth, Ky., 473 S.W.2d 104(1971). This

Court is faced with a question of whether its notion concerning the actual happening can be substituted for that of the trial court and the jury. Under the circumstances of the impoverished, environmentally deprived upbringing of the child, (which certain of the Defense Photographic Exhibits confirm) it cannot be said that the child's failure to describe the sexual advances to her family, indicates that it did not happen. Hurt v. Commonwealth, Ky., 379 S.W.2d 726(1964). The physical indications of anal-vagina irritations of the infant, the presence of the child in the company of the intoxicated appellant at a late hour in the evening, and the discrepancies advanced as to how the infant was found by appellant and Mr. Justice the next morning, November 21, were of such materiality to give such testimony probative quality necessary to sustain a conviction, Dixon v. Commonwealth, Ky., 505 S.W.2d 771 (1974).

Regarding the convicting under KRS 435.130, Detaining a Child with Intent to Deprive the Parents of Custody, appellant states in his brief at pages 12-13:

The only real bone of contention on this charge is that defendant's intention to deprive Norma Jean's parents of her custody. Again it is admitted that the defendant's intentions can be inferred from the circumstances of the case and the defendant's acts are circumstances from which his intent may be inferred.

Deputy Sheriff of Lawrence County, Joe Penix stated at TE 72 that appellant admitted "having the little girl back on the hill...." Further, the appellant did not deny that Norma Jean was in his company on November 20, 1974.

Mrs. Donna Justice, mother of David Jr., stated at TE 75:

Q13. All right. Now when [Norma Jean] came to

your home, what was the first thing you knew about her coming there, or did you see anybody pull in in a vehicle?

A. Bob Ferguson pulled in the gate and I went out to see whether Dave needed help to get in, and he said, "Mommy, I can get in myself." I said, "Bob, which one of the children that is?" He said, "I reckon she is Drew Parker's." He said, "We have picked her up on the road, walking down the road."

Q14. Bob Ferguson told you they had picked her up walking down the road? (emphasis added)

A. He sure did. It wouldn't do me no good to tell a lie about it. (emphasis added)

Ora McKenzie stated that David Justice, Jr., wanted him to take the girl back to her parents on the morning of November 21, 1974.

At TE 80:

Q15. Did you at that time ask [David Justice] why the girl was there at his house some eight or ten miles from home?

A. No I didn't. He told me that they had found her on the road.

Q16. Who had found her on the road?

A. Him and Bob.

\*

\*

\*

Q19. Just found her on the road?

A. He said, found her beside the road; Dave said, Bob got pretty close to her with the truck before he seen what it was, and stopped, and she didn't have much clothes on and was freezing and picked her up and took her to his mother's house.

Q20. Dave Justice's mother?

A. Yes.

Such discrepancies of when and where Norma Jean was encountered refutes allegations advanced by appellant that he had no intention of depriving Norma Jean's parents of her custody. The jury could readily surmise that the intent to unlawfully detain had

occurred the previous evening.

## ARGUMENT

### II

PROSECUTOR, IN HIS OPENING STATEMENT, HAD THE RIGHT TO DIRECT THE ATTENTION OF THE JURY TO ALL THE FACTS AND CIRCUMSTANCES THAT HE, IN GOOD FAITH, BELIEVED HE COULD DEVELOP IN THE COMMONWEALTH'S PRESENTATION OF THE EVIDENCE.

Appellant argues at page 15 of his brief:

[The Commonwealth's Attorney] is telling the jury that, whether [Norma Jean Parker] tells the jury this or not, she has already told it to him and that is all that is necessary so they will know what happened to the little girl.

Mr. Ferguson complains that the prosecutor made inflammatory references in his opening statement as to testimony that he incorrectly anticipated Norma Jean Parker and Dr. Musgrave to present to the jury.

Appellee's position is that certain portions of the Commonwealth's opening statement, TE 6A-6C, which were not objected to by defense trial counsel, but now asserted as error in retrospect by appellate counsel, can be believed to have been made in good faith and that it referred only to what the Commonwealth expected to prove. Norma Jean Parker's presentation on the stand was a series of "I don't remember," responses; typical of a frightened youth who had experienced a traumatic encounter. She did not come through with responses that added much positive, direct proof of the commission of the offenses. Further, the prosecutor probably anticipated the physician to be less equivocal as to the latter's opinion of the degree of molestation.

Appellee argues that a prosecutor can direct the jury's attention to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence. Freeman v. Commonwealth,

Ky., 425 S.W.2d 575 (1968).

### ARGUMENT

#### III

THE CLOSING ARGUMENT OF THE COMMONWEALTH'S ATTORNEY WAS NOT OF SUCH INFLAMMATORY, IMPERMISSIBLE MAGNITUDE REQUIRING EITHER THE TRIAL COURT TO DECLARE A MISTRIAL, OR NECESSITATING APPELLATE REVERSAL.

The closing arguments of opposing counsel were not recorded verbatim in the TE. However, counsel for Mr. Ferguson alleges that the Commonwealth's Attorney went astray in two specific instances, namely, attacking the character of the accused at TE 157 and commenting on certain specific questions that could have been posed to the seven year old victim, TE 158, but which were not so directed.

Regarding the attack on the "good reputation of the appellant," appellee would merely comment that an accused who testifies must anticipate that the Commonwealth may attack his reputation for truthfulness, Short v. Commonwealth, Ky., 42 S.W.2d 696 (1931), but a defendant's general reputation for a particular trait of personality or character may not be attacked until he himself puts it in issue by attempting to show it is good. See TE 131-132 and the retort thereto at TE 133. Where the charge involves a sex offense, generally the accused's character for chastity and morality is admissible. The prosecutor's allegedly objectionable comment is at TE 157:

And then he comes in and tells you about what a good reputation this defendant has and a good fellow he is and all of that; do you see any neighbor or anybody from Blaine, you find one at Blaine that will come in here and say he has a good reputation and he will surprise me.

...  
It can be inferred that this line of argument was aimed at Mr. Ferguson's moral fibre comprising his character.

Appellant moved for a mistrial based upon the fact that the prosecutor's comments concerning Norma Jean Parker amounted to testimony not before the jury, rather than argumentation.

The Commonwealth's Attorney responded to this latter allegation of error at TE 158-159:

...defense counsel speculated to a great extent as to what he considered the limitation of the testimony of the young girl, Norma Jean Parker, and opened the door to the matter of speculation, and that the Commonwealth had a right to respond to such speculation on behalf of defense counsel....

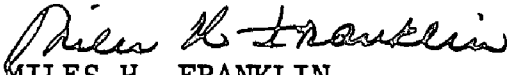
Without the content of the defense argumentation before this Court, the appellee must accept the prosecution's assessment that he made reasonable comments in refutation of the defense argumentation to the jury. It has been held that a prosecutor's closing argument, even if otherwise improper, offered in rebuttal to the closing argument of the defense is permissible. Meyer v. Commonwealth, Ky., 472 S.W.2d 479 (1971).

#### CONCLUSION

For the foregoing reasons appellee submits that the judgment of the Johnson Circuit Court should be affirmed.

Respectfully submitted,

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